IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1324 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DARBAR ISHWARJI BABARJI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MISS. C.M.SHAH, FOR H.L.PATEL ADVOCATES for Appellant,
MS.PANDIT, ADDL.PUBLIC PROSECUTOR for Opponent,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 18/10/2007

ORAL JUDGMENT

This appeal is preferred under the provisions of Section 374 of the Code of Criminal Procedure, whereby the appellant-original accused No.2 has challenged the legality and validity of the judgment

and order of conviction and sentence passed by the learned Additional Sessions Judge, Fast Track Court, Patan on 3rd October, 2003, in Sessions Case No.10 of 2003. There were total six accused persons and the learned trial Judge has charged and tried them for the offence punishable under Sections 363, 366, 376, 394 read with Section 109 and 114 of the Indian Penal Code. However, at the conclusion of the trial the learned Judge was pleased to acquit the original accused No.1 and original accused Nos.3 to 6 from all the charges levelled against them. Whereas, the learned trial Judge was pleased to convict the appellant-original accused No.2 for the offence punishable under Sections 363, 366 and 376 of the Indian Penal Code and sentenced him as under:

i) For the offence punishable under Section 363 of the Indian Penal Code to undergo three years rigorous imprisonment and to pay a fine of Rs.1,000/- and in default punishment is of four month simple imprisonment.

ii) For the offence punishable under Section 366 of the Indian Penal Code to undergo four years rigorous imprisonment and to pay a

fine of Rs.1,000/- and in default punishment is of four months simple imprisonment.

iii)For the offence punishable under Section 376 of the Indian Penal Code to undergo seven years rigorous imprisonment and to pay a fine of Rs.1,000/- and in default punishment is of four months simple imprisonment.

1.1 The learned Judge has ordered that all the sentences shall run concurrently and appellant is given the benefit of set off.

2. The judgment and order of conviction and sentence has been assailed on various grounds as mentioned in paragraph 4 of the memo of appeal. According to learned trial Judge, the prosecution was successful to bring home the charge against the original accused No.2-present appellant. Miss C.M.Shah, learned Advocate appearing for the appellant-original accused No.2 has submitted that the finding arrived at by the learned trial Judge is erroneous and same is based on improper appreciation

of evidence especially the conviction recorded for the offence punishable under Section 376 of the Indian Penal Code, the learned trial Judge has considered some inadmissible evidence mainly the statement of the prosecutrix made before the doctor at the time when she was taken for medical examination by the Investigating Agency.

3. On the other hand, Ms.Pandit, learned A.P.P. has submitted that the appellant is responsible for committing heinous crime of kidnapping and rap of victim younger-girl, who is below fourteen years of age as per the birth date reflected in the school leaving certificate which has been received in the evidence during trial. It has come on record that two real sisters were kidnapped and thereafter were subjected to sexual abuse and were rapped. The Police was able to trace out the original accused Nos.1 and 2 as well as both the victim girls after several days from the date of their kidnapping. It is the say of prosecution that the original accused Nos.3 to 6 were the abettors to the main offence committed by original accused Nos.1 and 2, but the totality of the

evidence as led by the prosecution takes to the conclusion that there is cogent evidence against the present appellant-original accused No.2 and therefore he has been held guilty for the aforementioned offences. The learned trial Judge has considered the F.S.L. Report for linking the accused with the crime so far as the offence punishable under Section 376 of the Indian Penal Code because both the victim girls committed suicide after about fifteen days from the date on which both the girls were brought to the native village and / or parental home. Before they were taken to Government Hospital for medical examination, ossification test of one of the victim was also carried out on demand made by the Investigating Officer. Statements of these two victim girls were recorded and the medical certificate issued by the doctor shows that hymen of victim younger-girl who was rapped by the present appellant-original accused No.2 was not intact and / or torn hymen. Therefore, it would not be proper to say that the finding recorded by the learned trial Judge is either perverse or patently illegal.

4. To appreciate the rival contentions firstly it would be beneficial to state the basic facts of the prosecution case in brief. It is alleged that on 28th April, 2002, in the morning or immediately thereafter when both the victim girls were working in the field of their father-complainant Dangsangbhai Vaghabhai Joshi, at that time the present appellant with original accused No.1 had enticed and kidnapped both the victim girls with a view to see that both can be compelled to marry with them against their will and wish and thereafter to compel them for sexual intercourse. It is alleged that intention of the accused was to seduce both the victim girls. The victim girls were minor and one of them was below fourteen years of age. It is alleged that initially both the victims girls were taken by original accused Nos.1 and 2 to various places including Agrwal Dharamsal, Abu Road and other different places till 6th June, 2002. The case of prosecution is that original accused Nos.1 and 2 committed offence punishable under Sections 363, 366 and 376 of the Indian Penal Code. However, at the conclusion of the trial, considering the age and other maturity aspect

of the victim-elder girl, who was allegedly rapped by original accused No.1, the learned trial Court has acquitted accused No.1 from the charge of all the offence punishable under Sections 363, 366 and 376 of the Indian Penal Code. The father of the victim girl was firstly informed by some of his caste fellows and other relatives who had seen the victim girls in the company of both the accused persons in a jeep car but at that time they were not knowing that both the victim-girls were being kidnapped. It is also the case of prosecution that both the accused persons were working as labourer in the adjoining agricultural field and therefore original accused No.1 had an opportunity to entice the elder sister and developed some acquaintance with her. Thereafter on the date of the incident both the girls including younger one were kidnapped. It is alleged that accused No.4 was driving the jeep car in which both of them were initially taken. The accused No.4 came to be arrested and thereafter he was taken on Police remand. It is not necessary to state the details as to what role had been played by the other accused persons, as they have been acquitted by the learned

trial Judge but during the course of investigation it was revealed that younger sister who was about fourteen years of age, was rapped by the present appellant on more than one occasion against her will and wish. When accused No.1 was exploiting younger sister, at that time the appellant was committing sexual offence qua younger one.

5. There is no acquittal appeal preferred by the State against the original accused No.1 or against the another accused persons nor any appeal for enhancement of sentence under the provisions of Section 377 of the Criminal Procedure Code has been preferred. So, the learned Advocate appearing for the appellant has concentrated her submission keeping in mind the finding of guilt recorded by the learned trial Judge.

5.1 No original birth certificate has been produced in the present case. It is in evidence that birth of both these victim girls were registered with the Village Panchayat. However, the Investigating Officer has not taken care to get a copy of such

certificate from the concerned Village Panchayat. According to prosecution the birth dates of both the victim-girl was 1st June, 1984 and 1st June, 1988 respectively. The prosecution has produced the proof as to birth date of both these victim girls in the form of two different school leaving certificates and these certificates have been proved by the Officer, i.e. the teacher of the school and she has stated that as per school register, the birth date of elder girl is 1st June, 1984 and birth date of younger girl was 1st June, 1988.

5.2 At present the Court is concerned with the birth date of the younger girl, who according to case of prosecution was rapped by the present appellant-original accused No.2. As per evidence led by prosecution, on the date of incident the victim-younger sister had completed only thirteen years and ten months. It is argued that as per rule of best evidence the prosecution could have produced the certificate showing the exact date of birth and failure on part of prosecution would go to the root of the case. However, the victim-younger sister was

sent for medical examination for the purpose of determining her age and it reveals from the evidence that approximate age of the victim-younger sister must be between fourteen and fifteen, meaning thereby the victim-younger sister was less than sixteen years of age. When the school leaving certificate indicates that victim-younger sister was about fourteen years of age on the date of incident, it is possible to argue for prosecution that on the date of incident the victim-younger sister was about fourteen years of age and had not completed sixteen years of age. It has come during cross-examination of the witnesses examined that rest of the girls who were admitted in the school during the very relevant period alongwith the victim-younger sister were born in the year 1989 so it is difficult to doubt the genuineness of the year of birth shown as 1989 in the school leaving certificate of the victim-younger sister.

6. In response of the query raised by the Court, learned Advocate for the appellant has fairly submitted that order of conviction so far as offence

punishable under Sections 363 and 366 of the Indian Penal Code can be upheld without entering into further discussion because the appellant has no good case considering the other facts that have been proved by the prosecution keeping in mind the relevant age of 18 years and the fact that at the time of arrest of accused, the victim was found with the accused. However, it is submitted that the conviction recorded under Section 376 of the I.P.C. is not legal, because there is no conclusive evidence as to the age of victim and the evidence in the nature of opinion cannot be read as substantive piece of evidence.

6.1 The victim-younger sister with her elder sister had committed suicide after undergoing medical examination etc. and therefore her statement before the Doctor or Police could not have been read as a substantive piece of evidence. The learned trial Judge in paragraph 76 and 77 has considered the statement made by the victim-younger girl before the Police as well as before Medical Officer who examined her, as a substantive piece of evidence while

recording the finding of guilt for the offence punishable under Section 376 of the Indian Penal Code. The discussion made in paragraph 77 also deals with the report of F.S.L. The learned trial Judge has mentioned that on the clothes of the victim-younger girl the blood mixed with semen was found; whereas the serological examination report indicates that it is not possible to record a positive finding as to group wise qua either blood or semen. It is in evidence that blood group of the present appellant-accused was of group 'A' and when the cloth of the victim-younger sister was not found with either blood or semen of group 'A', it was not safe for the Court to link the accused with the crime punishable under Section 376 of the Indian Penal Code. Even otherwise this would have been a corroborative piece of evidence and it would not help the prosecution in absence of substantive piece of evidence as to commission of rape. The case of prosecution is not based on circumstantial evidence. When the original case is based on direct evidence and in absence of direct evidence, the accused ought to have been acquitted from the charge of offence punishable under

Section 376 of the Indian Penal Code. So this Court by confirming the finding of guilt for the offence punishable under Section 363 and 366 of the Indian Penal Code, may acquit the accused from the charge of offence punishable under Section 376 of the Indian Penal Code.

7. Having considered the reasons assigned by the learned trial Judge and the submissions made by the learned Advocate for the appellant, Ms.Pandit, learned A.P.P. has submitted that it is not necessary to go into further discussion when the appellant has not pressed the appeal against the order of conviction and sentence so far as offence punishable under Section 363 and 366 of the I.P.C. is concerned. In this regard the learned trial Judge has assigned good reasons and this Court by adopting the reasons assigned by the learned trial Judge may confirm the finding of guilty and upheld the order of conviction and sentence even under Section 376 of the Indian Penal Code.

7.1 In response of the query raised by the

Court, learned A.P.P., has fairly accepted that history given by the victim-younger sister to the doctor ought not to have been read or considered as substantive / direct piece of evidence, in absence of evidence of the person who made that statement. Of course, such statement made to the doctor is relevant and can be used as corroborative piece of evidence being admissible in evidence, but undisputedly when the victim-younger girl was taken to the Hospital for medical examination by the Police it would not safe for the Court to read such statement as conclusive piece of evidence. Here, when the victim-younger girl was not available for giving her evidence and if her statement does not fall in the category of statement under Section 32 of the Indian Evidence Act, the learned trial Judge ought not to have considered such statement as relevant and / or substantive piece of evidence and the accused can be given the benefit of doubt for want of legal evidence. The act of commission of suicide by both the victim girls is a pathetic story as submitted by Ms.Pandit, but that itself would not make the evidence legal or otherwise admissible.

8. Having considered the above submission, the say of Miss Shah, learned Advocate appearing for the appellant is accepted keeping in mind the nature of evidence led by prosecution and the legal position brought to the notice of the Court by both the Advocates appearing for the parties, the accused deserves benefit of doubt for want of such evidence satisfactory in nature.

9. For the reasons aforesaid, the present appeal is partly allowed. The judgment and order of conviction, sentence and fine recorded by the learned Additional Sessions Judge, Fast Track Court, Patan in Sessions Case No.10 of 2003 on 3rd October, 2003, so far as offence punishable under Section 363 and 366 of the Indian Penal Code, is hereby confirmed. Whereas, the judgment and order of conviction and sentence passed by the learned trial Judge so far as offence punishable under Section 376 of the Indian Penal Code is hereby quashed and set aside. The appellant is ordered to be set at liberty forthwith, if he has served the sentence, so also, if not required in any other case. Amount of fine, if paid,

by the appellant in respect of offence punishable under Section 376 of the Indian Penal Code, is ordered to be refunded to him on proper identification.

(C.K.BUCH, J.)

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